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82-389

No.

IN THE

# Supreme Court of The United States

October Term, 1982

ROSE CONNOR, a/k/a ROSE CONNER,
Respondent

v.

W. C. LEASURE, an individual,
Petitioner

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Petitioner, W. C. Leasure[1], respectfully prays that a Writ of Certiorari issue to review the judgment order entered by the United States Court of Appeals for the Third Circuit on June 29, 1982.

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## QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE BANKRUPTCY COURT IMPROPERLY EXERCISED SUMMARY JURISDICTION OVER THE PROPERTY AT ISSUE BASED ON ITS CLEARLY ERRONEOUS FINDING THAT RESPONDENT CONNOR HAD ACTUAL OR CONSTRUCTIVE POSSESSION OF SAID PROPERTY?

II. WHETHER, IRRESPECTIVE OF THE VALIDITY OF THE 1944 TAX SALE, THE BANKRUPTCY COURT IMPROPERLY EXERCISED SUMMARY JURISDICTION BASED ON ITS CLEARLY ERRONEOUS FINDING THAT THE 1950 TAX SALE OF RESPONDENT CONNOR'S PROPERTY WAS INVALID?

III. WHETHER THE BANKRUPTCY COURT ABUSED ITS DISCRETION IN REFUSING TO ABSTAIN FROM THE EXERCISE OF SUMMARY JURISDICTION OVER A CONTROVERSY INVOLVING UNSETTLED QUESTIONS OF STATE PROPERTY LAW?

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1. At the inception of this matter in the Bankruptcy Court, Old Home Manor, Inc. and the Commissioners of Westmoreland County were named as defendants. Both were stipulated out of this matter prior to trial by agreement of counsel. Though the Commissioners later intervened in the appeal by Petitioner Leasure to the United States District Court for the Western District of Pennsylvania and separately appealed to the United States Court of Appeals for the Third Circuit, they no longer have any interest in this matter and are no longer parties hereto.

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## OPINIONS OF THE COURTS BELOW

The United States Court of Appeals for the Third Circuit affirmed the judgment of the District Court without an opinion. The memorandum opinion of the District Court, not reported, is reproduced in the Appendix hereto at App. 1a. The three opinions of the United States Bankruptcy Court for the Western District of Pennsylvania, all unpublished, are reproduced in the Appendix hereto at App. 4a - 38a.

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## STATEMENT OF JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to Title 28 U.S.C. §1254(1) providing for jurisdiction to review final decisions of the federal courts of appeals by the Supreme Court on Writ of Certiorari.

On June 29, 1982, a panel of the United States Court of Appeals for the Third Circuit entered a Judgment Order affirming the judgment of the District Court at Third Circuit Docket Nos. 81-2615 and 81-2616 (App. 40a). Petitioner Leasure filed a timely Petition for Rehearing Before the Original Panel from the Judgment Orde. of June 29, 1982. On July 27, 1982, the Third Circuit entered an Order denying Petitoner's Petition for Rehearing at Third Circuit Docket No. 81-2615. (App. 42a)

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## CONSTITUTIONAL AMENDMENTS, STATUTES, AND RULES

Title 11 U.S.C. §711 (Bankruptcy Act 1898)

Article III—Jurisdiction, Powers, and Duties of the Court.

> Where not inconsistent with the provisions of this chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

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## STATEMENT OF THE CASE

**Procedural History**

On April 4, 1977, the Respondent, Rose Connor ("Connor"), filed a Chapter XI Petition for an Arrangement under the Bankruptcy Act, 30 Stat. 544-66 as amended, 11 U.S.C. §1 (1970). In her Petition, Respondent Connor listed, under Schedule B-1 Real Property:

> 167.5 acres ± of mineral rights located in Derry Township, Westmoreland County, Pennsylvania, recorded in Deed Book Volume 1080 at page 457 (subject to certain disputed instruments of record), recorded in the Recorder's Office of Westmoreland County, Pennsylvania.[2]
>
> 2000 acres ± of mineral rights located in Derry Township, Westmoreland County, Pennsylvania, recorded in Deed Book Volume 1128 at page 578 in the Recorder's Office of Westmoreland County, Pennsylvania. ("1128 property")

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2. This parcel of property will hereafter be referred to as the "1080 property". However, this property is not involved in this dispute.

On February 16, 1978, Connor filed a Complaint and later an Amended Complaint in the Bankruptcy Court in the nature of a quiet title action against Petitioner Leasure, Old Home Manor, Inc., and the Westmoreland County Commissioners requesting, *inter alia*, that Leasure's recorded deeds to the 1128 property be stricken from the County records and declared null and void by the Bankruptcy Court.

In response thereto, Petitioner Leasure filed a Motion to Dismiss pursuant to Fed. R.C.P. 12 alleging that the Bankruptcy Court lacked summary jurisdiction to adjudicate title to the 1128 property.

On December 28, 1978, W. C. Leasure filed an equity action against Connor in the Court of Common Pleas of Westmoreland County to quiet his title to the property and to reform a certain deed from the Westmoreland County Commissioners to Leasure's predecessor in title. In that action, Leasure pleaded Commissioner Deeds of record which vested absolute title to him and ousted any possible claim of title by Connor, all of which had been known to Connor *ab initio*.

On January 2, 1979, Leasure filed a Complaint in the Bankruptcy Court for relief from the stay provisions of Bankruptcy Rule 11-44 so that the plenary action in the Westmoreland County Court of Common Pleas could proceed to finally adjudicate the disputed title.

On April 20, 1979, the Bankruptcy Court denied the Rule 12 Motion to Dismiss in order to determine the propriety of its assumption of summary jurisdiction to decide title to real property. The Court set a hearing on the merits for May 24, 1979, and simultaneously continued generally Leasure's Complaint for Relief from Stay under Rule 11-44 (App. 37a - 39a)

Leasure filed a timely appeal from the denial of the Motion to Dismiss and filed a Motion to Stay the April

20, 1979, Order Pending Appeal in the Bankruptcy Court. When such motion was denied, Leasure filed a Motion to Stay Pending Appeal in the District Court. The District Court denied such motion and held that the Bankruptcy Court could receive evidence in order to make a determination on the propriety of exercising summary jurisdiction to decide the question of title to the disputed coal property. (App. 39a)

On May 24, 1979, trial commenced in this matter. At several times during the five day trial, counsel for Petitioner Leasure renewed his objection to the summary jurisdiction of the Bankruptcy Court. Post-trial briefs were filed by both parties and on March 21, 1980, the Bankruptcy Court, per the Honorable Bernhard Schaffler, entered a Memorandum Opinion and Order which determined that the Bankruptcy Court had jurisdiction to decide the issue of title to the 1128 property and further, that title to such property vested in Connor. (App. 17a - 27a)

On December 10, 1980, pursuant to a Motion for New Trial, a Motion to Alter and/or Vacate Judgment, and a Motion for Amended Findings of Fact and Conclusions of Law, the Bankruptcy Court, per the Honorable Joseph L. Cosetti, entered a Memorandum Opinion and Order vacating the March 21, 1980, Order but finding against Leasure on the issue of title on different grounds. Judge Cosetti did, however, adopt Judge Schaffler's opinion concerning the propriety of the Bankruptcy Court's exercise of summary jurisdiction. (App. 17a)

On January 9, 1981, Leasure appealed to the District Court for the Western District of Pennsylvania, which subsequently affirmed the judgment of the Bankruptcy Court, to the extent indicated in the Memorandum Opinion and Order. (App. 1a)

On September 11, 1981, Leasure appealed the District Court judgment to the United States Court of Appeals for the Third Circuit. On June 29, 1982, the Third Circuit entered a Judgment Order affirming the District Court judgment and on July 27, 1982, denied Leasure's Petition for Rehearing Before the Original Panel. (App. 40a - 42a)

On August 13, 1982, Leasure obtained a Stay of Mandate until September 2, 1982, in order to file the instant Petition for Writ of Certiorari. (App. 44a)

**Factual History**

The 1128 property at issue here is part of a larger tract of coal owned originally by the Latrobe-Connellsville Coal & Coke Company. In 1930, C. P. Lineweaver, Trustee, acquired title to all of the remaining Latrobe-Connellsville Coal & Coke Company properties and coal and in 1932 conveyed said property to the Pennsylvania Company for Insurances on Lives and Granting Annuities, Trustee (hereinafter "Pennsylvania Company).

In 1941, Pennsylvania Company, being in default on its 1939 and 1940 property taxes, made five conveyances of the coal it owned. One of these conveyances was to Respondent Connor by deed dated April 24, 1941, but not recorded until April 2, 1943, in Deed Book Volume 1128, page 578. It is this property which is the subject of the instant dispute.

Particularly important is the language contained in that 1128 deed:

> This conveyance is made subject to the liens of all unpaid taxes against said respective premises, payment of which grantee hereby assumes.

The record indicates that for the years 1939, 1940, and 1941, Pennsylvania Company paid no taxes assessed

against its property (the 1128 property conveyed to Connor) and as a result, the Treasurer of Westmoreland County, Pennsylvania, on February 23, 1944, sold all property of the Pennsylvania Company assessed and liened for unpaid taxes for the year 1941, to the Commissioners of Westmoreland County. This is evidenced by Treasurer's Deed No. 714.

The record indicates that beginning in 1947 and continuing in subsequent years, assessments in the name of Rose Connor appeared in the assessment records for Derry Township, Westmorland County. These assessments were based on certain coal leases by Connor of portions of the 1128 property to unrelated parties. Taxes on these assessments were never paid by Connor and liens were entered against the 1128 property each year. In 1950, the Treasurer of Westmoreland County sold these portions of the 1128 property to the County Commissioners.

On July 10, 1975, the Commissioners of Westmoreland County conveyed to Petitioner Leasure, in consideration of payment of all delinquent taxes, all of their interest whatsoever in the properties of the Pennsylvania Company as acquired through Treasurer's Deed 714. On August 14, 1975, the Commissioners conveyed to Leasure, in consideration of payment of all delinquent taxes, a corrective deed to delineate their interest whatsoever in properties of the Pennsylvania Company as acquired through Treasurer's Deed 714, the Lineweaver Deed No. 923, p. 258, as well as any interest in the properties of Rose Connor, et al. On January 27, 1977, pursuant to an Order of the Court of Common Pleas of Westmoreland County, the Commissioners conveyed to Petitioner Leasure any and all interest in the property of the Pennsylvania Company and all subsequent grantees.

## REASONS FOR GRANTING THE WRIT

### 1. There Currently Exists In The Different Circuits Of The United States Courts Of Appeals A Conflict Over The Legal Standard To Be Applied In Determining Whether An Exercise of Summary Jurisdiction Is Proper Pursuant To Section 311 Of The Bankruptcy Act.

Section 311 of the Bankruptcy Act, 11 U.S.C. §711 provides:

> Where not inconsistent with the provisions of this Chapter, the court in which the petition is filed shall, for the purposes of this chapter, have exclusive jurisdiction of the debtor and his property, wherever located.

As expansive as this language may at first blush appear, it is well settled that the intent of the Bankruptcy Act is to allow the bankruptcy courts to exercise summary jurisdiction only in a limited sphere. *In the Matter of Security Investment Properties, Inc.*, 559 F.2d 1321 (5th Cir. 1977), relying on *Taubel-Scott-Kitzmiller Co. v. Fox*, 264 U.S. 426 (1924). Legislative intent, however, is not the sole reason for the cautious exercise of summary jurisdiction. This Court, as well as others, have recognized that inherent in the exercise of such summary jurisdiction is the concomitant deprivation of the claimant's right to trial in a plenary suit. As so aptly stated by the Ninth Circuit:

> The power of a bankruptcy court to resolve adverse claims concerning the assets of the bankrupt's estate is indeed a power of imposing magnitude. Since it results in depriving adverse claimants of a plenary suit, we must ever be cautious lest we permit its

extension to a situation that should not permit summary disposition.

*Suhl v. Bumb*, 346, F.2d 869 (9th Cir. 1955), *cert. denied*, 382 U.S. 938 (1956). *See also Taubel-Scott-Kitzmiller Co. v. Fox, supra*, and *Matter of Carnell Construction Corp.*, 424 F.2d 296, 298 (3rd Cir. 1970).

To determine whether the exercise of summary jurisdiction is proper, it must be determined whether Connor had actual or constructive possession of the property at issue. *Thompson v. Magnolia Petroleum Co.*, 309 U.S. 478 (1940). In *Kyle v. Stewart*, 360 F.2d 753, 756, 757 (5th Cir. 1966), the court, relying on *American Mannex Corporation v. Huffstutler*, 329 F.2d 449, 451 and n. 4 (5th Cir. 1964) stated:

> ... the physical possession—here uncontradicted—is not the statement of the solution, it is the beginning of the problem. Rather, 'the question' is whether the party has a *legal* right to maintain the actual physical possession.

*See also In Re Stockman Development Company*, 447 F.2d 387 (9th Cir. 1971).

From the opinion of the District Court, as well as those of the Bankruptcy Court, it is obvious that the decision to exercise summary jurisdiction rested on the alleged invalidity of the 1944 tax sale of Connor's property. Only the Bankruptcy Court's Opinion of December 10, 1980, considers the effect of the tax sale of Connor's property in 1950. On that point, the Court found:

> (10) The record also shows that the Treasurer of Westmoreland County sold for taxes several other properties of Rose Connor on August 7, 1950. The properties were sold for 1947 and 1948 taxes and described as follows:

| Defense Exhibit | Treasurer's Deed | Amount | Description |
|---|---|---|---|
| G | 554 | $180.61 | '8½ acres of coal' |
| H | 556 | 52.53 | '1.38 acres' |
| I | 557 | 172.33 | '4.768 acres' |
| J | 558 | 180.58 | '5 acres' |
| K | 559 | 13.26 | '1¾ acres' |

Only Defense Exhibit "G", Treasurer's Deed No. 554 above, describes a taking of coal property. The record is not clear as to which grantor deed created the interest in Rose Connor which Treasurer's Deed No. 554 divested. The record is not clear as to the description of the property and whether the Westmoreland County Commissioners have, pursuant to a judicial sale, pased title to the '8½ acres of coal' to another party.

We make no finding except that the Commissioners would have had good title absent redemption by Rose Connor to coal property which the 554 deed described as '8½ acres of coal'. Further evidence is needed to describe this property.

* * * * * * * * *

We conclude that title to the 1128 property remains in Rose Connor unless facts indicate that the Treasurer's Deed No. 554 derived from 1128 property.

Petitioner Leasure has contended throughout that the Treasurer's Deeds 556, 357, and 558 (App. 45a, 48a, 51a) conveyed not only coal property, but coal property from the 1128 tract. The assessment records, which correspond to these deeds, found in the Appendix at 47a, 50a, and 50a, clearly indicate not only that coal was being assessed, but also that these parcels were from the 1128 property. Given this, there is no doubt that these deeds

effectively conveyed the 1128 property to the County Commissioners. Furthermore, the Bankruptcy Court, in the same opinion, conceded such sales were valid, by stating, with regard to Deed 554: "We conclude that title to the 1128 property remains in Rose Connor unless facts indicate that the Treasurer's Deed No. 554 derived from the 1128 property." (App. 14a) Since Leasure has demonstrated that Deeds 556, 557 and 558 conveyed coal, and were part of the 1128 property, this conclusion is valid as to those deeds. Hence, it is clear that Leasure, or at least the Commissioners, had the legal right to possession of the 1128 property as early as 1950, and therefore, Connor could not have been in actual possession of the property. Therefore, the exercise of summary jurisdiction in this instance was improper.

A finding that Connor lacked actual possession of the 1128 property does not end the Court's inquiry in this matter. It must next determine whether Petitioner Leasure held possession of the property and if so, whether his claim to that property was "so insubstantial and obviously insufficient, either in fact or in law, as to be plainly without color of merit, and a mere pretense". *Harrison v. Chamberlin*, 271 U.S. 191, 195 (1926).

In its Memorandum Opinion of March 21, 1980, which was expressly adopted by the court in its December 10, 1980, opinion, the Bankruptcy Court emphasized that the "defendant never had possession" of the property in dispute. (App. 19a) However, such reasoning is error since, as in the test for actual possession, it is the legal right to possession, not physical possession, which is determinative as to whether a third party claimant holds possession. *See Matter of Christain and Porter Aluminum Company*, 584 F.2d 326 (9th Cir. 1978).

The law in Pennsylvania concerning the legal rights of a tax sale purchaser is unassailably clear; once title to property is acquired by deed pursuant to tax sale, the right of possession vests exclusively in the purchaser, absent a redemption. *Wheatcroft v. Auritt*, 312 A.2d 441 (Pa. Super. 1973) and *Day v. Ostergard*, 21 A.2d 586 (Pa. Super. 1941). In the case at bar, the statutory redemption period had expired before Respondent Connor filed her petition; thus, Petitioner Leasure was entitled to possession of the property.

On the basis of the foregoing, Petitioner Leasure submits that it has been demonstrated that he has met the burden enunciated in *American Mannex Corp. v. Huffstetler, supra*, for determining whether an adverse party's claim is merely colorable:

> Of course he need not prove the basis for his claim to the point where he obtains a favorable adjudication of it. But he certainly must go far enough to show, first, that there is an arguable factual basis for the claim, and second, that as such factual basis there is some plausible ground for thinking that the law will afford redress.

Petitioner Leasure is not unaware of the many cases which hold that possession alone, and not the legal right thereto, is determinative of the question of summary jurisdiction. *In re California Paving Co.*, 95 F. Supp. 909 (N.D. Calif. 1951), *aff'd sub nom. California Paving Co. v. Smith* (9th Cir.), *cert. denied*, 343 U.S. 957 (1952); *Kapelus v. A Joint Venture*, 377 F.2d 815 (9th Cir. 1967); *Fitzgerald v. W. F. Sebel Co.*, 295 F.2d 654 (10th Cir. 1961) and *In re Eakin*, 154 F.2d 717 (2nd Cir. 1946). It is, in fact, this conflict which forms the basis for his request that this Court issue a Writ of Certiorari.

**2. Did The Bankruptcy Court Abuse Its Discretion By Refusing To Abstain From The Exercise Of Summary Jurisdiction Over A Controversy Involving Unsettled Questions Of State Property Law?**

In *Thompson v. Magnolia Petroleum Company*, 9 U.S. 478, 483-84 (1980), the Supreme Court held that a bankruptcy court had erroneously assumed summary jurisdiction where the dispute involved unsettled questions of state law. Said Justice Black speaking for an unanimous court:

> [The] decision with which the federal court of bankruptcy is here faced calls for interpretation of instruments of conveyance in accordance with Illinois law. Neither statutes nor decisions of Illinois have been pointed to which are clearly applicable... unless the matter is referred to the state courts, upon subsequent decision by the Supreme Court of Illinois, it may appear that rights in local property of parties to this proceeding have—by the accident of jurisdiction—been determined contrary to the law of the state which in such matters is supreme.

The doctrine enunciated in *Thompson* is merely an extension of the long recognized principle of federal abstention. Bankruptcy court abstention is required when "the issues raised in a case involve questions which are fraught with a 'substantial state interest',... such as unsettled questions of state mineral or real property law". *Matter of Kaleidoscope*, 3 B.R. 7, 10 (N.D. Ga. 1980), quoting *Colorado River Conservation District v. United States*, 424 U.S. 800, 814 (1976).

The bankruptcy court below opined that the issues at bar were not such as would require abstention:

> This Court will not be called upon to enter areas of state law upon which the state courts have never entered . . . the law of Pennsylvania is established on this question. The facts in this case do not require new law.

On appeal, the District Court went beyond the Bankruptcy Court decisions, holding that "[b]ecause *In Re Return of Sale of Tax Claim Bureau* so clearly governs the outcome of this litigation, we have no difficulty in upholding the Bankruptcy Court's jurisdiction." (App. 2a)

However, because the District Court had failed to consider the significance of the 1950 tax sale, the Bankruptcy Court's opinion, per Judge Cosetti, is now determinative of Petitioner Leasure's claim to the 1128 property.

In that opinion, the court declared without reference to Pennsylvania authority, that:

(1) The absence of the word "coal" in a treasurer's deed means that such deed did not convey coal;

(2) As a matter of state law, the Court of Common Pleas of Westmoreland County, Pennsylvania, had no authority to reform the deeds in question, and

(3) As a matter of state law, the Westmoreland County Commissioners had no authority to sell property for back taxes by quit-claim deed. (App. 12a)

Current Pennsylvania law highlights the extreme likelihood that the Pennsylvania Supreme Court would reach a holding directly opposite to those reached by the bankruptcy court.

First, it would appear that absence of the word "coal" in a treasurer's deed is irrelevant as to what is actually conveyed. In Pennsylvania, a treasurer's deed is "based on the assessment *and conveys the interests in land which are properly included within the assessment,*" regardless of the deed's actual wording. *Bannard v. New York State Natural Gas Corp.*, 293 A.2d 41 (Pa. 1972) (emphasis added) (held, assessment of "minerals" includes gas and oil, thus subsequent treasurer's deed conveyed all interest in gas and oil, despite no reference thereto). In the instant case, Exhibits P, Q and S (App. 47a, 50a, 53a) show that coal was the interest assessed. Therefore, it is irrelevant that the treasurer's deeds (Exhibits H, I, and J, App. 45a, 48a, 51a) failed to use the word "coal".

Second, counsel has found no Pennsylvania law that prohibits the use by the County Commissioners of a quit-claim deed to convey property sold for delinquent taxes. *See*, e.g., *In Re Private Sale of County Owned Lands*, 40 Northumb. L.J. 58 (Pa. Com. Pl. 1968). It is the duty of County Commissioners to dispose of lands acquired by them at treasurer's sale, and sale of such lands should not be disapproved because the title which the Commissioners may convey is doubtful or uncertain. Leasure submits that the vehicle of conveyance is whatever the taxing body determines conveys the appropriate estate.

Therefore, "by accident of federal jurisdiction," Leasure's rights in the 1128 property were determined contrary to the law of Pennsylvania. Summary disposition of his claim was inappropriate and an abuse of the bankruptcy court's discretion.

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## CONCLUSION

Petitioner herein respectfully requests this Honorable Court to grant his Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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